action for damages is automatically extinguished if he applies to the Commissioner for compensation under the Act. What it does say is that a workman shall not maintain an action for damages if an application for compensation has been made by him to the Commissioner.

It seems to us that it was never the intention of the legislature to deprive a workman of his common law rights against his employer. The scheme of the Act is not to abrogate a workman's common law cause of action but to enable him, if he wishes, to get a speedy remedy for the injury suffered by him. The Act sees to it that he does not get a double benefit – both compensation under the Act and damages under the common law for the one injury (Sec. 18).

A workman's cause of action in tort against his employer immediately vests in him under the common law and he has the right to bring proceedings in the court and this right continues in him until such time as he may be debarred from doing so by the law of limitation.

Under section 33(1)(a) the worker is debarred from bringing a common law action for damages so long as there is an application by the workman before the Commissioner for compensation. But this debarrment in no way affects the cause of action already vested in him. The Act does not prohibit the withdrawal of the application for compensation. As soon as the application for compensation is withdrawn, the right to maintain an action revives and the workman can then proceed with his action for damages in the court. The workman's right to compensation under the Act lies dormant while he pursues his common law action but should he lose the action he may choose to ask the court, under section 33(2), to assess compensation under the Act.

The Act does not expressly declare that an application to the Commissioner for compensation under the Act *ipso facto* abrogates a workman's common law right for damages.

We are in agreement with the learned Judge that the workman can withdraw his application for compensation under the Act and proceed and maintain his action for damages in the courts.

Appeal dismissed.

Solicitors: *Murphy & Dunbar; S.B. Shah.*

MALAYSIAN REPORTS

LEE AH TEE v. ONG TIOW PHENG & ORS.

[F.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani F.JJ.) October 20, 1983]

[Johor Bahru – Federal Court Civil Appeal No. 186 of 1982]

Company Law – Application by shareholder alleging mismanagement, misappropriation, fraud, embezzlement and general disregard for the rules – Application for appointment of receiver and for company to be wound up – Application dismissed – Companies Act, 1965, s.181.

Practice and Procedure – Application for adjournment – Refusal – Discretion of trial judge.

In this case the appellant took out a petition under section 181 of the Companies Act, 1965 as a shareholder of a company and alleged mismanagement, misappropriation of company funds, fraud, embezzlement and general disregard for the rules of the company. The Judicial Commissioner who heard the application dismissed it on the ground that it had no real merits. He found that there was no ground to order the company to be wound up and he also found no evidence of fraud or oppression. The appellant appealed and relied on two grounds. First he contended that the learned Judicial Commissioner was wrong to deny him the adjournment he asked for and second he contended that the learned Judicial Commissioner was wrong to dismiss the petition on the merits.

Held: (1) this was not really a case of refusing an application for adjournment but a case of refusing to further adjourn after a number of adjournments granted previously. In this case the learned Judicial Commissioner exercised his discretion correctly in refusing a further adjournment after all the previous adjournments;

(2) on the evidence before him it was little surprise that the learned Judicial Commissioner found no merit in the petition.

Cases referred to:

(1) *K. Ratnasingam* v. *Kow Ah Dek & Anor.* [1983] 2 M.L.J. 297.
(2) *Dick* v. *Piller* [1943] 1 All E.R. 627.
(3) *Maxwell* v. *Keun & Ors.* [1928] 1 K.B. 645.
(4) *Mohanlal Gordhandas Sheth* v. *Ban Guan & Co.* [1956] M.L.J. 13.

FEDERAL COURT.

Wong Swee Min and (subsequently) *Miss Cheong Yoke Ping* for the appellant.

H. Ball and *Ng Seng Kang* for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani F.J. (delivering the judgment of the Court): The appellant took out a Petition under Section 181 of the Companies Act, 1965 as a shareholder of the United Chinese

Transport Co. Sdn. Bhd., cited as the eighth respondent in the Petition. In the Petition the appellant alleged mismanagement, misappropriation of Company funds, fraud, embezzlement and "general disregard for rules as laid down in the Company's Memorandum and Articles of Association". The Memorandum and Articles were however not exhibited.

The said Petition was dated July 18, 1981 and the petitioner's affidavit verifying the Petition was affirmed on July 19, 1981. All the respondents filed their notice of intention to appear on the Petition as shareholders and/or Directors of the Company. Of all the affidavits filed by the respondents the affidavit of the second respondent, Ng Eng Guan, shareholder and Manager of the Company affirmed on November 6, 1981, provided the most comprehensive reply to all the allegations made in the Petition.

The background would seem to be that the Petitioner had originally been appointed as additional Director on September 6, 1976. But at the 30th Annual General Meeting of the Company held on October 7, 1979 the Petitioner was not re-elected as Director. After that he made numerous queries on the running of the affairs of the Company and his grievances are reflected in the allegations set out in his Petition.

On behalf of the Company it was contended that the Directors of the Company had from time to time regularly placed before the Company at its Annual General Meetings duly audited balance sheets and profit and loss accounts of the Company as required by the Companies Act and all these accounts were regularly passed at these meetings.

After hearing the evidence adduced before him the learned Judicial Commissioner found that the claims in the Petition had no real merits and regarded the Petition as appellant's "personal vendetta" against the duly appointed Directors and others. The learned Judicial Commissioner then dismissed the Petition with costs. In his grounds of judgment the learned Judicial Commissioner also found that there was no ground to order the Company to be wound up and he also found no evidence of fraud or oppression but only "minor queries" which he said could easily be disposed of by the shareholders at the general meeting of the Company.

The appellant was dissatisfied and appealed; and in his appeal he relied on two grounds. First he contended that the learned Judicial Commissioner was wrong to deny him the adjournment he asked for on June 24, 1982 and secondly he contended that the learned Judicial Commissioner was wrong to dismiss his Petition on the merits.

First the question of the refusal of the learned Judicial Commissioner to grant the adjournment on June 24, 1982. Before a decision can be made on this point it would be necessary first to study the background of the proceeding. The case came up for hearing first on March 2, 1982. The appellant was then represented by counsel. The hearing commenced and continued on March 3, 1982 and then adjourned to March 17, 1982 and then again adjourned to April 7, 1982 for continued hearing. After the hearing on April 7, 1982 the appellant lost his counsel who had discharged himself. From the record of the proceeding it would appear that the parties had also agreed on March 17, 1982 that all queries on the accounts of the Company should be dealt with at the Company's meeting which was then scheduled to be held shortly. On April 7, 1982, the appellant's new counsel applied for adjournment which was granted and the continued hearing was fixed to be on June 7, 1982. On June 7, 1982 however the appellant's counsel again applied for an adjournment. This was recorded as the "last adjournment" granted and the case was fixed for continued hearing on June 24, 1982. When the case came up for continued hearing on June 24, 1982 the appellant again applied for an adjournment apparently to engage a new counsel. This application for adjournment was opposed by the other parties on the grounds that like all the previous applications for adjournments by the appellant this was also applied for at the last minute. The request for adjournment was accordingly refused by the learned Judicial Commissioner. The appellant then continued with his examination-in-chief without counsel. Then a 15-minute adjournment was allowed by the learned Judicial Commissioner to enable the appellant to decide whether he wanted to proceed with his examination without counsel. When the appellant returned to the court he stated that he was not prepared to continue with his examination nor was he prepared to be subjected to cross-examination without counsel. The learned Judicial Commissioner having apparently lost his patience ordered the case to proceed whereupon the appellant closed his case.

It can be seen clearly here that this is not really a case of refusing an application for adjournment but a case of refusing to *further* adjourn the hearing after a number of adjournments granted previously. If nothing else can be said in favour of refusing the adjournment on June 24, 1982 at least it can be said that the facts of this case with the numerous adjournments already granted should warrant the same sort of censure as was done in the recent Privy Council case of *K. Ratnasingam* v. *Kow Ah Dek & Anor.*[1]

The discretion of the Judge to allow or refuse an application for adjournment was a subject dealt with in depth by the Court of Appeal in *Dick* v. *Piller.*[2] We agree to and adopt the following principles as regards the discretion in allowing or refusing an adjournment:-

(1) Whether or not a party should be granted an adjournment is wholly at the discretion of the Judge. He would exercise the discretion solely upon his view of the facts.

(2) *Prima facie* this discretion is unfettered.

(3) The question to ask in any particular case is whether on the facts there are adequate or sufficient reasons to refuse the adjournment.

(4) Although an appellate court has power to interfere with the Judge's decision in regard to the granting of an adjournment, it would refrain from doing so unless it appears that such discretion has been exercised in a way which tended to show that all necessary matters were not taken into consideration or the decision was otherwise arbitrarily made.

(5) An appellate court ought to be very slow to interfere with the exercise of the discretion. But if it appears that the result of the order made below would be to defeat the rights of the parties altogether or that there would be an injustice to one or the other of the parties then the appellate court has power and indeed a duty to review the exercise of the discretion.

Dick v. *Piller* reviewed a number of authorities on the exercise of the discretion and amongst the cases cited was *Maxwell* v. *Keun & Ors.*[3] In that case Atkin L.J. set out some important guidelines in his judgment appearing at pages 653 and 657 respectively. It is useful to repeat them and they are as follows:

"The Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so."

"In the exercise of a proper judicial discretion no judge ought to make such an order as would defeat the rights of a party and destroy them altogether, unless he is satisfied that he has been guilty of such conduct that justice can only properly be done to the other party by coming to that conclusion."

Maxwell v. *Keun & Ors.* was cited with approval in a local Court of Appeal case, *Mohanlal Gordhandas Sheth* v. *Ban Guan & Co.*[4]

On the facts of this case we found no ground to disagree with the learned Judicial Commissioner and accordingly dismissed the appeal on the question of adjournment. We are of the view that the learned Judicial Commissioner exercised his discretion correctly in refusing a further adjournment after all the previous adjournments.

We now come to the next ground of appeal. The Petitioner called six witnesses namely PW1, PW2, PW3, PW4, PW5 and PW7. The Petitioner himself was PW6. On going through the record we found nothing in the testimonies of PW1, PW2, PW3, PW4 and PW5 to support any of the allegations in the Petition. As regards PW7 it is clear in his evidence that he was the Company's auditor during the material period 1978, 1979, 1980. According to him his firm decided to resign as auditors to enable a new set of auditors to have a fresh look at the Company's accounts. PW7 was a witness called by the Petitioner and PW7 testified that during the three years he was auditor of the Company's accounts he found everything to be in order.

In his Petition the appellant had asked, *inter alia,* that a Receiver and Manager be appointed for the Company and alternatively that the Company be wound up. Appellant's entire case was contained in the Petition. On the evidence before him it is little surprise to us that the learned Judicial Commissioner found no merit in the Petition.

Accordingly the appeal was dismissed with costs on both grounds.

Appeal dismissed.

Solicitors: *Megat Majmuddin, Leong & Co.; Marina Yusoff & Co.; Sault & Co.; Ng Seng Kang & Partners.*